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17 Attorneys for Plaintiff United States of America

18  
19 IN THE UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

20 UNITED STATES OF AMERICA,

21 Plaintiff,

22 v.

23 BRIAN CHUCHUA,

24 Defendant.  
25

Case No. 01 CV 1479 DMS (AJB)

[PROPOSED]  
CONSENT DECREE

26 WHEREAS, the Plaintiff, the United States of America, on behalf of the United States  
27 Environmental Protection Agency ("EPA"), filed the Complaint herein against Defendant Brian  
28

1 Chuchua (“Defendant”), alleging that Defendant violated Sections 301(a), 308(a), 309(a) of the  
2 CWA, 33 U.S.C. §§ 1311(a), 1318(a), 1319(a);

3 WHEREAS, the Complaint alleges that Defendant violated CWA Section 301(a) by  
4 discharging dredged or fill material and/or controlling and directing the discharge of dredged or  
5 fill material into waters of the United States at the Oasis Ranch site located in San Diego County,  
6 California (the “Site”) and more fully described in the Complaint, without authorization by the  
7 United States Department of the Army Corps of Engineers (“the Corps”);

8 WHEREAS, the Complaint seeks (1) to enjoin the discharge of pollutants into waters of  
9 the United States in violation of CWA Section 301(a), 33 U.S.C. § 1311(a); (2) to require  
10 Defendant, at their own expense and at the direction of EPA, to restore and/or mitigate the  
11 damages caused by their unlawful activities; and (3) to require Defendant to pay a civil penalty  
12 as provided in 33 U.S.C. § 1319(d);

13 WHEREAS, Defendant denies that he has violated the foregoing statutory provisions;

14 WHEREAS, this Consent Decree is intended to constitute a complete and final settlement  
15 of the United States' claims against Defendant under the CWA set forth in the Complaint  
16 regarding the Site;

17 WHEREAS, the United States and Defendant agree that settlement of this case is in the  
18 public interest and that entry of this Consent Decree is the most appropriate means of resolving  
19 the United States' claims under the CWA against Defendant in this case; and

20 WHEREAS, the Court finds that this Consent Decree is a reasonable and fair settlement  
21 of the United States' claims against Defendant in this case, and that this Consent Decree  
22 adequately protects the public interest in accordance with the CWA and all other applicable  
23 federal law.

24 THEREFORE, before the taking of any testimony upon the pleadings, without further  
25 adjudication of any issue of fact or law, and upon consent of the parties hereto by their  
26 authorized representatives, it is hereby ORDERED, ADJUDGED and DECREED as follows:

1 I. JURISDICTION AND VENUE

2 1. This Court has jurisdiction over the subject matter of these actions and over the  
3 parties pursuant to 28 U.S.C. §§ 1331, 1345, and 1355, and Section 309(b) of the CWA, 33  
4 U.S.C. § 1319(b).

5 2. Venue is proper in the Southern District of California pursuant to CWA Section  
6 309(b), 33 U.S.C. § 1319(b), and 28 U.S.C. §§ 1391(b) and (c), because the subject property is  
7 located in this District, and the causes of action alleged herein arose in this District.

8 3. The Complaint states claims upon which relief can be granted pursuant to  
9 Sections 301(a), 308(a), 309(a) of the CWA, 33 U.S.C. §§ 1311(a), 1318(a), 1319(a).

10 II. APPLICABILITY

11 4. The obligations of this Consent Decree shall apply to and be binding upon  
12 Defendant and any person, firm, association or corporation who is, or will be, acting in concert  
13 or participation with Defendant whether or not such person has notice of this Consent Decree. In  
14 any action to enforce this Consent Decree against Defendant, Defendant shall not raise as a  
15 defense the failure of any person, firm or corporation acting in concert or participation with  
16 Defendant, to take any actions necessary to comply with the provisions hereof.

17 III. SCOPE OF CONSENT DECREE

18 5. This Consent Decree shall constitute a complete and final settlement of all civil  
19 claims for injunctive relief and civil penalties alleged in the Complaint against Defendant under  
20 CWA Sections 301(a), 308(a), 309(a), 33 U.S.C. §§ 1311(a), 1318(a), 1319(a), concerning the  
21 Site.

22 6. It is the express purpose of the parties in entering this Consent Decree to further  
23 the objectives set forth in CWA Section 101, 33 U.S.C. § 1251. All obligations in this Consent  
24 Decree shall have the objective of causing Defendant to achieve and maintain full compliance  
25 with, and to further the purposes of, the CWA.

26 7. Except as in accordance with this Consent Decree, Defendant and his agents,  
27 successors and assigns are enjoined from discharging any pollutant into waters of the United  
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1 States, unless such discharge complies with the provisions of the CWA and its implementing  
2 regulations.

3 8. This Consent Decree is not and shall not be interpreted to be a permit or  
4 modification of any existing permit issued pursuant to Sections 402 or 404 of the CWA, 33  
5 U.S.C. §§ 1342 or 1344, or any other law. Nothing in this Consent Decree shall limit the ability  
6 of the Corps to issue, modify, suspend, revoke or deny any individual permit or any nationwide  
7 or regional general permit, nor shall this Consent Decree limit the EPA's ability to exercise its  
8 authority pursuant to Section 404(c) of the CWA, 33 U.S.C. § 1344(c).

9 9. This Consent Decree in no way affects or relieves Defendant of his responsibility  
10 to comply with any applicable federal, state, or local law, regulation or permit.

11 10. This Consent Decree in no way affects the rights of the United States as against  
12 any person not a party to this Consent Decree.

13 11. The United States reserves any and all legal and equitable remedies available to  
14 enforce the provisions of this Consent Decree and applicable law.

15 12. Nothing in this Consent Decree shall constitute an admission of fact or law by any  
16 party.

#### 17 IV. SPECIFIC PROVISIONS

##### 18 CIVIL PENALTY

19 13. Defendant shall pay a civil penalty to the United States in the amount of Seventy-  
20 eight Thousand Four Hundred Dollars (\$78,400.00) within fifteen (15) days of entry of this  
21 Consent Decree.

22 14. Defendant shall make the above-referenced payment by FedWire Electronic  
23 Funds Transfer ("EFT" or wire transfer) to the U.S. Department of Justice account in accordance  
24 with current electronic funds transfer procedures, referencing U.S.A.O. file number  
25 2001V00519, EPA Region IX and the DOJ case number 90-5-1-1-16111. Payment shall be  
26 made in accordance with instructions provided to Defendant by the Financial Litigation Unit of  
27 the United States Attorney's Office for the Southern District of California. Any payments  
28

received by the Department of Justice after 4:00 P.M. (Eastern Time) will be credited on the next business day.

15. Upon payment of the civil penalty required by this Consent Decree, Defendant shall provide written notice, at the addresses specified in Section X of this Consent Decree, that such payment was made in accordance with Paragraph 14.

16. Civil penalty payments pursuant to this Consent Decree (including stipulated penalty payments under Section IX) are penalties within the meaning of Section 162(f) of the Internal Revenue Code, 26 U.S.C. § 162(f), or of 26 C.F.R. § 1.162-21 and are not tax deductible expenditures for purposes of federal law.

#### MITIGATION PROJECT

17. Defendant shall complete a mitigation project which the parties agree is intended to secure important environmental benefits, by purchasing 0.16 mitigation credits at the Pilgrim Creek Mitigation Bank ("Pilgrim Creek") at a cost of \$21,600 within fifteen (15) days of entry of this Consent Decree.

18. Defendant shall provide EPA and the Department of Justice written notice in accordance with the provisions of Section V (Notice) below of his purchase of mitigation credit at Pilgrim Creek within ten (10) days after the purchase. Such notice shall include a copy of written acknowledgment of Defendant's purchase of the mitigation credit from the San Diego Association of Governments (SANDAG), which administers Pilgrim Creek.

19. Upon receipt of the civil penalty required by this Consent Decree (including stipulated penalty payments under Section IX) and receipt of acknowledgment from SANDAG (under paragraph 18, above) of the purchase of mitigation credit at Pilgrim Creek, the United States shall promptly move the Court to dismiss the Complaint against Defendant.

#### V. NOTICES AND OTHER SUBMISSIONS

20. Within 10 days after the deadline for completing any task set forth in this Consent Decree, Defendant shall provide the United States with written notice, at the addresses specified in Section X of this Consent Decree, of whether or not that task has been completed

21. If the required task has been completed, the notice shall specify the date when it was completed, and explain the reasons for any delay in completion beyond the scheduled time for such completion required by the Consent Decree.

22. In all notices, documents or reports submitted to the United States pursuant to this Consent Decree, the Defendant shall, by signature of a senior management official, certify such notices, documents and reports as follows:

I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering such information, the information submitted is, to the best of my knowledge and belief, true, accurate and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.

## VI. RETENTION OF RECORDS

23. Until one (1) year after entry of this Consent Decree, Defendant shall preserve and retain all records and documents now in their possession or control or which come into their possession or control that relate in any manner to the performance of the tasks in this Consent Decree, regardless of any corporate retention policy to the contrary. Until one year after entry of this Consent Decree, Defendant shall also instruct his agents to preserve all documents, records, and information of whatever kind, nature or description relating to the performance of the tasks in this Consent Decree.

24. At the conclusion of the document retention period, Defendant shall notify the United States at least 90 days prior to the destruction of any such records or documents, and, upon request by the United States, Defendant shall deliver any such records or documents to EPA. The Defendant may assert that certain documents, records and other information are privileged under the attorney-client privilege or any other privilege recognized by federal law. If the Defendant asserts such a privilege, they shall provide the United States with the following: (1) the title of the document, record, or information; (2) the date of the document, record, or information; (3) the name and title of the author of the document, record, or information; (4) the

1 name and title of each addressee and recipient; (5) a description of the subject of the document,  
2 record, or information; and (6) the privilege asserted by Defendant. However, no documents,  
3 reports or other information created or generated pursuant to the requirements of the Consent  
4 Decree shall be withheld on the grounds that they are privileged.

## 5 VII. DISPUTE RESOLUTION

6 25. Any dispute that arises with respect to the meaning or requirements of this  
7 Consent Decree shall be, in the first instance, the subject of informal negotiations between the  
8 United States and Defendant to attempt to resolve such dispute. The period for informal  
9 negotiations shall not extend beyond thirty (30) days beginning with written notice by one party  
10 to the other affected party or parties that a dispute exists, unless agreed to in writing by those  
11 parties. If a dispute between the United States and Defendant cannot be resolved by informal  
12 negotiations, then the position advanced by the United States shall be considered binding unless,  
13 within fourteen (14) days after the end of the informal negotiations period, the Defendant files a  
14 motion with the Court seeking resolution of the dispute. The motion shall set forth the nature of  
15 the dispute and a proposal for its resolution. The United States shall have thirty (30) days to  
16 respond to the motion and propose an alternate resolution. In resolving any such dispute, the  
17 Defendant shall bear the burden of proving by a preponderance of the evidence that the United  
18 States' position is not in accordance with the objectives of this Consent Decree and the CWA,  
19 and that the Defendant's position will achieve compliance with the terms and conditions of this  
20 Consent Decree and the CWA.

21 26. If the United States believes that a dispute is not a good faith dispute, or that a  
22 delay would pose or increase a threat of harm to the public or the environment, it may move the  
23 Court for a resolution of the dispute prior to the expiration of the thirty (30) day period for  
24 informal negotiations. The Defendant shall have fourteen (14) days to respond to the motion and  
25 propose an alternate resolution. In resolving any such dispute, the Defendant shall bear the  
26 burden of proving by a preponderance of the evidence that the United States' position is not in  
27 accordance with the objectives of this Consent Decree, and that the Defendant's position will  
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1 achieve compliance with the terms and conditions of this Consent Decree and the CWA.

2 27. The filing of a motion asking the Court to resolve a dispute shall not extend or  
3 postpone any obligation of Defendant under this Consent Decree, except as provided in  
4 Paragraph 33 below regarding payment of stipulated penalties.

5 VIII. FORCE MAJEURE

6 28. Defendant shall perform the actions required under this Decree within the time  
7 limits set forth or approved herein, unless the performance is prevented or delayed solely by  
8 events which constitute a Force Majeure event. A Force Majeure event is defined as any event  
9 arising from causes beyond the control of Defendant, including his employees, agents,  
10 consultants and contractors, which could not be overcome by due diligence and which delays or  
11 prevents the performance of an action required by this Consent Decree within the specified time  
12 period. A Force Majeure event does not include, inter alia, increased costs of performance,  
13 changed economic circumstances, changed labor relations, normal precipitation or climate  
14 events, changed circumstances arising out of the sale, lease or other transfer or conveyance of  
15 title or ownership or possession of a site, or failure to obtain federal, state or local permits.

16 29. If Defendant believe that a Force Majeure event has affected Defendant's ability  
17 to perform any action required under this Consent Decree, Defendant shall notify the United  
18 States in writing within seven (7) days after the event at the addresses listed in Section X. Such  
19 notice shall include a discussion of the following:

- 20 A. what action has been affected;  
21 B. the specific cause(s) of the delay;  
22 C. the length or estimated duration of the delay; and  
23 D. any measures taken or planned by the Defendant to prevent or minimize  
24 the delay and a schedule for the implementation of such measures.

25 Defendant may also provide to the United States any additional information that they deem  
26 appropriate to support their conclusion that a Force Majeure event has affected their ability to  
27 perform an action required under this Consent Decree. Failure to provide timely and complete  
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1 notification to the United States shall constitute a waiver of any claim of Force Majeure as to the  
2 event in question.

3 30. If the United States determines that the conditions constitute a Force Majeure  
4 event, then the deadline for the affected action shall be extended by the amount of time of the  
5 delay caused by the Force Majeure event. Defendant shall coordinate with EPA to determine  
6 when to begin or resume the operations that had been affected by any Force Majeure event.

7 31. If the parties are unable to agree whether the conditions constitute a Force  
8 Majeure event, or whether the length of time for fulfilling the provision of the Consent Decree at  
9 issue should be extended, any party may seek a resolution of the dispute under the procedures in  
10 Section VII of this Consent Decree.

11 32. Defendant shall bear the burden of proving (1) that the noncompliance at issue  
12 was caused by circumstances entirely beyond the control of Defendant and any entity controlled  
13 by Defendant, including their contractors and consultants; (2) that Defendant or any entity  
14 controlled by Defendant could not have foreseen and prevented such noncompliance; and (3) the  
15 number of days of noncompliance that were caused by such circumstances.

#### 16 IX. STIPULATED PENALTIES

17 33. After entry of this Consent Decree, if Defendant fails to timely fulfill any  
18 requirement of the Consent Decree, Defendant shall pay a stipulated penalty to the United States  
19 for each violation of each requirement of this Consent Decree as follows:

- |    |    |   |                   |
|----|----|---|-------------------|
| 20 | A. | For Day 1 up to and including<br>Day 30 of non-compliance | \$500.00 per day  |
| 21 | B. | For Day 31 up to and including<br>60 of non-compliance    | \$750.00 per day  |
| 22 |    |   |                   |
| 23 | C. | For Day 61 and beyond<br>of non-compliance                | \$1000.00 per day |
| 24 |    |   |                   |

24 Such payments shall be made upon demand by the United States.

25 34. In the event that a stipulated penalty payment is applicable and not made on time,  
26 interest will be charged in accordance with the statutory judgment interest rate provided for in 28  
27 U.S.C. § 1961. The interest shall be computed daily from the time the payment is due until the  
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1 date the payment is made. The interest shall also be compounded annually.

2 35. Any stipulated penalty accruing pursuant to this Consent Decree shall be payable  
3 upon demand and due not later than 30 days after Defendant's receipt of the United States'  
4 written demand.

5 36. The United States may, in the unreviewable exercise of its discretion,  
6 reduce or waive stipulated penalties otherwise due it under this Consent Decree.

7 37. Any disputes concerning the amount of stipulated penalties, or the underlying  
8 violation that gives rise to the stipulated penalties, that cannot be resolved by the parties pursuant  
9 to the Dispute Resolution provisions in Section VII and/or the Force Majeure provisions in  
10 Section VIII shall be resolved upon motion to this Court as provided in Paragraphs 25 and 26.

11 38. The filing of a motion requesting that the Court resolve a dispute shall stay  
12 Defendant's obligation to pay any stipulated penalties with respect to the disputed matter  
13 pending resolution of the dispute. Notwithstanding the stay of payment, stipulated penalties  
14 shall continue to accrue from the first day of any failure or refusal to comply with any term or  
15 condition of this Consent Decree. In the event that Defendant does not prevail on the disputed  
16 issue, stipulated penalties shall be paid by Defendant as provided in this Section.

17 39. To the extent Defendant demonstrate to the Court that a delay or other non-  
18 compliance was due to a Force Majeure event (as defined in Paragraph 28 above) or otherwise  
19 prevail on the disputed issue, the Court shall excuse the stipulated penalties for that delay or non-  
20 compliance.

21 40. In the event that a stipulated penalty payment is applicable and not made on time,  
22 interest will be charged in accordance with the statutory judgment interest rate provided for in 28  
23 U.S.C. § 1961. The interest shall be computed daily from the time the payment is due until the  
24 date the payment is made. The interest shall also be compounded annually.

25 41. Defendant shall make any payment of a stipulated penalty by FedWire Electronic  
26 Funds Transfer ("EFT" or wire transfer) to the U.S. Department of Justice account in accordance  
27 with current electronic funds transfer procedures, referencing U.S.A.O. file number  
28

2001V00519, EPA Region IX and the DOJ case number 90-5-1-1-16111. Payment shall be made in accordance with instructions provided to Defendant by the Financial Litigation Unit of the United States Attorney's Office for the Southern District of California. Any payments received by the Department of Justice after 4:00 P.M. (Eastern Time) will be credited on the next business day. Further, upon payment of any stipulated penalties, Defendant shall provide written notice, at the addresses specified in Section X of this Decree.

X. ADDRESSES

42. All notices and communications required under this Consent Decree shall be made to the parties through each of the following persons and addresses:

A. TO EPA:

(1) Marcela von Vacano  
Assistant Regional Counsel  
United States Environmental Protection Agency  
Region IX, ORC-2  
75 Hawthorne Street  
San Francisco, CA 94105

(2) Robert Leidy  
Wetlands Regulatory Office  
United States Environmental Protection Agency  
Region IX, WTR-8  
75 Hawthorne Street  
San Francisco, CA 94105

B. TO THE UNITED STATES DEPARTMENT OF JUSTICE

Pamela S. Tonglao, Attorney  
Environmental Defense Section  
Environment and Natural Resources Division  
U.S. Department of Justice  
P.O. Box 23986  
Washington, D.C. 20026-3986

Robert H. Foster  
United States Department of Justice  
Environment and Natural Resources Division  
Environmental Defense Section  
999 18<sup>th</sup> Street, Suite 945, North Tower  
Denver, CO 80202

C. TO DEFENDANT BRIAN CHUCHUA:

Bradford T. Child  
Millard Holweger Child & Marton

XI. COSTS OF SUIT

43. Each party to this Consent Decree shall bear its own costs and attorneys' fees in this action. Should Defendant subsequently be determined by the Court to have violated the terms or conditions of this Consent Decree, Defendant shall be liable for any costs or attorneys' fees incurred by the United States in any action against Defendant for noncompliance with or enforcement of this Consent Decree.

XII. PUBLIC COMMENT

44. The parties acknowledge that after the lodging and before the entry of this Consent Decree, final approval by the United States is subject to the requirements of 28 C.F.R. § 50.7, which provides for public notice and comment. The United States reserves the right to withhold or withdraw its consent to the entry of this Consent Decree if the comments received disclose facts which lead the United States to conclude that the proposed judgment is inappropriate, improper, or inadequate. Defendant agrees not to withdraw from, oppose entry of, or to challenge any provision of this Consent Decree, unless the United States has notified Defendant in writing that it no longer supports entry of the Consent Decree.

XIII. CONTINUING JURISDICTION OF THE COURT

45. This Court shall retain jurisdiction over this action in order to enforce or modify the Consent Decree consistent with applicable law. During the pendency of the Consent Decree, any party may apply to the Court for any relief necessary to construe and effectuate the Consent Decree.

XIV. MODIFICATION

46. Upon its entry by the Court, this Consent Decree shall have the force and effect of a final judgment. Any modification of this Consent Decree shall be in writing, and shall not take effect unless signed by both the United States and Defendant and approved by the Court.

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XV. TERMINATION

47. This Consent Decree may be terminated by either of the following:

1. The United States may at any time make a unilateral motion to the Court for termination of this Decree or any portion of it; or
2. Defendant may make a unilateral motion to the Court to terminate this Decree after the following has occurred:
  1. Defendant has paid all penalties and completed the mitigation project hereunder and no penalties or other monetary obligations are outstanding or owed to the United States;
  2. Defendant has certified compliance pursuant to subparagraph 1 above to the Court and EPA; and
  3. within forty-five (45) days of receiving such certification from Defendant, EPA has not contested in writing that such compliance has been achieved. If EPA disputes Defendant's full compliance, this Consent Decree shall remain in effect pending resolution of the dispute by the Parties or the Court.

IT IS SO ORDERED.

Dated and entered this \_\_\_\_\_ day of \_\_\_\_\_, 200 \_\_\_\_.

\_\_\_\_\_  
United States District Judge

1  
2 FOR THE UNITED STATES:  
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4 THOMAS L. SANSONETTI  
5 Assistant Attorney General  
6 Environment and Natural Resources Division  
7  
8

Dated: \_\_\_\_\_

9 PAMELA S. TONGLAO  
10 United States Department of Justice  
11 Environment and Natural Resources Division  
12 Environmental Defense Section  
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17 ROBERT H. FOSTER  
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THOMAS SKINNER  
Assistant Administrator for Enforcement  
and Compliance Assurance  
U.S. Environmental Protection Agency  
Washington, D.C. 20460

Dated:\_\_\_\_\_

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WAYNE NASTRI  
Regional Administrator  
U.S. Environmental Protection Agency  
Region IX  
75 Hawthorne Street  
San Francisco, CA 94105

Dated:\_\_\_\_\_

\_\_\_\_\_  
MARCELA VON VACANO  
Assistant Regional Counsel  
United States Environmental Protection Agency  
Region IX  
75 Hawthorne Street  
San Francisco, CA 94105

Dated:\_\_\_\_\_



FOR BRIAN CHUCHUA:

\_\_\_\_\_  
BRADFORD T. CHILD  
Millard Holweger Child & Marton  
655 South Hope St., 12<sup>th</sup> Floor  
Los Angeles, CA 90017-3211  
Telephone: (213) 627-3113  
Facsimile: (213) 623-9237

Dated: \_\_\_\_\_

\_\_\_\_\_  
BRIAN CHUCHUA

Dated: \_\_\_\_\_